THE ATTORNEY GENERAL
OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

May 22, 1958

Hon. William A. Harrison
Commissioner of Insurance
State Board of Insurance
Austin 14, Texas

Opinion No. WW-435

Re: Article 3.39, Section 4, Texas Insurance Code Investments by a life insurance company in the stocks of a subsidiary corporation with an agreement made by the parent corporation to buy such stocks from the insurance company.

Dear Mr. Harrison:

We acknowledge receipt of your letter of March 31, 1958, requesting an opinion from this department upon a question arising from the following facts:

> "A Texas life insurance company owns and holds $400,000 in the preferred stocks of twenty separate and distinct variety stores which have been incorporated. These variety store corporations do not in and of themselves meet the requirements of Section 4 of Article 3.39 of the Insurance Code to make the stocks legal investments as the corporations are not five years old. The common stocks of each of these twenty incorporated variety stores are wholly owned by a larger incorporated store company. The store company directs the operations of each of the subsidiary variety stores.
>
> "When the life insurance company invested in the preferred stocks of the incorporated variety stores, the parent store-company executed an agreement with the life insurance company to purchase from the life insurance company, the preferred stock at a purchase price equal to the redemption price specified in the preferred stock certificates. The store-company further agreed that in the event the variety stores failed to declare and pay a semi-annual dividend of 6% per annum on their preferred stock at the time same was due and payable, to purchase from the life insurance company all of

the outstanding, and redeemed preferred stock of the variety stores for a purchase price equal to the redemption price specified in the said preferred stock certificates.

"Does the investment of the subsidiary corporation variety store's stocks, together with the repurchase agreement executed by the parent corporation, constitute an investment within the authority of Article 3.39, Section 4, of the Insurance Code, in the 'securities' of the parent corporation?"

The applicable statutory provision drawn in question by the above fact situation, and applicable thereto, is Article 3.39, Section 4, of the Texas Insurance Code, a portion of which reads as follows:

"A life insurance company organized under the law of this State may invest in or loan upon the following securities, <u>and none other</u>, viz.

"4 . . . . the capital stock, bonds, bills of exchange and/or commercial notes for bills and securities of any solvent corporation which has not defaulted in the payment of any debt within five years next preceding such investment, or of any solvent corporation which has not been in existence for five consecutive years next preceding such investment provided such corporation has succeeded to the business and assets and has assumed the liabilities of another corporation, which corporation and the corporation so succeeded have not defaulted in the payment of any debt within five years next preceding such investment . . ."

It may be seen that since 1909 the Legislature of Texas has regulated the investments of the funds of life insurance companies organized under the laws of Texas as a separate, distinct, and exclusive field of legislation. The laws thereon have been special and restricted. Succeeding sessions of the Legislature have surrounded these companies with particular and specific regulations.

In 1951, the 52nd Legislature of Texas brought forward, what was then the old Article 4725, and placed it, without substantial change, into the Insurance Code of the State of Texas under its new number 3.39, portions of which are quoted above. This department has had occasion to state its position with regard to Article 3.39, Section 4, involving the investments of Texas life insurance companies. In Attorney General's Opinion No. WW-293-A, the position of the department was thus stated:

> "A life insurance company cannot invest its capital, surplus and contingency reserves in the stock or commercial notes of any company which has not been in existence for a period of five years next preceding the date of such investment."

Thus the present problem resolves itself down to whether or not a guaranty or warranty agreement by a parent corporation may override the otherwise clear requirements of the legislative mandate. This department has likewise expressed itself regarding the above qualification under a previous administration in Attorney General Opinion No.)-3015, in which was stated:

> "It would thus be seen a security to be eligible for either class (speaking of life insurance corporations under 4725 and insurance corporations other than life under 4706) of these Texas corporations must be the direct obligation of the issuing corporation. The statutory definition of eligible securities excludes, therefore, stocks or shares evidencing merely participating interests by the holders in the net profits, if any , of the issuing concern."

The position of this department is further substantiated by an authoritative announcement in Corpus Juris Secundum which states as follows:

> "Investments of insurance corporations cannot be made in securities other than those prescribed by statute, and indirect evasion of such statutes, as by the medium of a subsidiary, will not be permitted . . . .
>
> "While an insurance company has implied power to make investments of its capital, and in the absence of legislative restriction, it may do so in the manner it deems most judicious, nevertheless, for the purpose of protecting policyholders and others, it is usual for the

> State to provide specifically how the funds of insurance companies shall be invested. In applying such statutes, no interpretation of a word, phrase, or sentence contained in a comprehensive investment code should be made without reference to the scheme of the entire code . . . ." 44 C.J.S. at page 632.

It thus appears that the agreement by the parent corporation with the investing insurance company by way of a re-purchase agreement does not overcome the inability of the subsidiary company to meet the requirements of Article 3.39 so as to make the investment legal, within the strict bounds of the legislative enactment. It would appear that any other construction of this portion of the statute would be an undue expansion and clearly subvert the intention of the legislature. From the facts given, it is apparent that the investment by the life insurance company is an investment in the securities of the subsidiary corporation and not the securities of the parent corporation. Thus, we conclude that the investments are merely investments in the stocks of the subsidiary corporation, with additional security from the parent, and are illegal investments for a Texas insurance company.

SUMMARY

The fact that a parent corporation, whose stocks qualify as valid investments guarantees the stock of a subsidiary corporation whose stocks do not qualify as valid investments, does not validate the stocks of the subsidiary so as to be legal investments for a Texas insurance company.

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Very truly yours,

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APPROVED:

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